



POLICE DEPARTMENT

September 5, 2007

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Robert Reed
Tax Registry No. 934100
67 Precinct
Disciplinary Case No. 82641/07

The above-named member of the Department appeared before me on May 21, 2007, charged with the following:

1. Said Police Officer Robert Reed, assigned to the 67th Precinct, while on-duty on or about 0445 hours on September 5, 2005, in the vicinity of East 39th Street and Church Avenue, Kings County, did use excessive force against an individual known to the Department by striking said individual on his shoulder with his nightstick without legal justification.

PG 203-11 Page 1, Paragraph 2 – USE OF FORCE

The Department was represented by Vincent Verdi, Esq. Department Advocate's Office, and the Respondent was represented by Michael Martinez, Esq.

The Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondent is found Not Guilty.

COURTESY • PROFESSIONALISM • RESPECT

EVIDENCEThe Department's Case

The Department called James Volcin as its witness.

James Volcin

Volcin has been employed by Best Buy, a retail merchandise store, for approximately one year. He stated that on September 5, 2005 at approximately 4:45 a.m., he was on East 39 Street and Church Avenue "hanging out" by his friend's car. He stated that it was "Jovette [West Indian Day Parade]" and while at the location he observed police officers clearing Church Avenue and spraying mace on a group of "young guys that were walking." Volcin stated that because he was standing at the location he assumed the officers were going to come after him because he was "just hanging out, too." He stated that he was not with the group that was maced, but was waiting for his brother to come back from a restaurant and that he was "getting ready to leave."

Volcin stated that "the officer told me to go down East 39 Street," and he told the officer that he was waiting "by my friend's car, they (his brothers) were coming right now." He then said that he (the Respondent) "grabbed [him] by his shirt and shoved [him]." He further stated that "After he grabbed me and shoved me, he hit [him] with his nightstick on [his] back and upper shoulder."

Volcin testified that he "was shocked. Nothing like that ever happened to me before. I turned around to try to get his badge number. He had hit me again. Then I couldn't see his badge number because it was dark. I saw his name after that, after he hit me a second time, I was very angry and I yelled out his name." He added that the name

on the badge was Reed. He also stated that the officer was dressed in his uniform.

Volcin stated that as a result of being struck he sustained "a bruise on [his] upper back or shoulder."¹

On cross-examination Volcin stated that this incident happened on Sunday night going into Monday morning at approximately 4:45 a.m. He stated that he began celebrating between 12 midnight and 1 a.m., with his three brothers and two friends and that he had not consumed alcohol that day. He stated that while there were a lot of people hanging out, the police were directing people which way they could go because there was a lot of traffic. "It was celebration on the streets."

Volcin acknowledged that the cars were moving slowly in the street because there were so many people walking in the area. He stated that he and his friends "were driving around first and then we started walking because we figured that driving was going to take too long so we walked and we drove and we walked again." He stated that after leaving a party on Rogers Avenue he went to Church Avenue and recalled they parked the car further down on East 39 Street near Linden Boulevard which was one block from Church Avenue.

After walking for awhile, they then drove to a restaurant and "parked on East 39 and Church Avenue." Volcin stated that after finally parking the car his brothers decided to go to a Haitian restaurant and get some food while he and his friends waited by the car "on the corner of Church and 39. It was mostly on 39 because the car was parked on the end of the block." He stated his brothers went to the restaurant at approximately 4:15a.m.

¹ While the Court accepted Volcin's medical records into evidence (DX 1), the Court pointed out that they were accepted primarily for the purpose of showing that force was used and not to show a level of injury because the Respondent was not charged with causing injury to Volcin.

Volcin stated that while he was waiting for his brothers he saw “cops coming from far away clearing out Church Avenue saying the celebration is over. So mostly everybody was going to go for the Labor Day parade [the next day] so they were clearing out the streets.” The “streets” he was referring to was Church Avenue. He added that the officers were telling “everybody to turn down the block, it didn’t matter if they lived on the next block.” He acknowledged that the police were not concerned if the people lived on that block, they still wanted them to leave. He further stated “I figured that it was going to be peaceful at that time, I saw them smashing bottles with sticks on the floor. Cops were breaking bottles. I thought people were throwing bottles at the cops. When it caught my attention I saw cops breaking bottles with sticks.”

Volcin stated while he was waiting by the car he heard that a few people got shot, but not by the police. He also stated that when he was in the car he saw a girl holding her eye and he believed it was because someone threw a bottle at her. He stated that the officers clearing Church Avenue were in groups of 10 to 15 officers and approximately 6 to 10 officers on horseback.

When Volcin was asked if the police were able to make it clear that they were looking to get all the people off Church Avenue he stated “Yeah. Church Avenue is a very busy street. It was going to be a regular day. Of course you had to clear out Church Avenue.” When he was reminded that when the police, including the Respondent, approached him he didn’t move, he stated “I was not on Church Avenue. I went down to East 39 Street. It was not down on East 39 Street. The car was parked on 39 Street. I was not on Church Avenue anymore.” He further stated that the police were clearing the Church Avenue area; “they didn’t want anybody near Church Avenue.” When he was

asked if it was clear to him that the police were trying to get people out of the area, he replied. "Yeah, of course." When he was also asked if it was clear that the police, after people being in the street until 4:15 a.m., at this point, were trying to get people to go home he replied, "Yeah. Some people were going home, some people were going straight to the Labor Day parade."

Volcin stated that when the police told him to move he tried to explain to them that he "was waiting for my brothers and that was my ride home. I was by their car. I wasn't by anybody else's car. I was by their car." Volcin acknowledged that the police were clearing the area and he stated that he did not clear the area because "I was not on Church Avenue. I was on East 39 Street near Church Avenue..."

When Volcin was further asked how he knew that the police were just clearing Church Avenue he stated "because they were walking down Church Avenue. They weren't walking down each block." He added that they didn't only focus on him, "they got mace in a group of other young guys. I was witnessing it. I was like that is wrong." He stated that he was just across the street from where he saw the officers macing the people. Volcin admitted, however, that he did not see the Respondent mace anyone.

Volcin testified that other than the Respondent, no other officers had contact with him. Rather "they were all watching." When asked how many officers were watching the Respondent having contact with him he stated "about 10 or 15 of them." When he was asked if the entire group of 10 to 15 officers went with the Respondent down 39 Street to turn their attention on him, Volcin stated "Well, the group that he was with, I am sure there was a lot of groups that were clearing Church Avenue. They couldn't do it by themselves. So the group he was with, that came to me." He stated that they did not

have helmets on, but he remembered the Respondent had his baton out and was wearing leather gloves.

Volcin then stated that "Officer Reed" grabbed him by his shirt while he was leaning on the car and then shoved him. Volcin could not remember if he fell but he remembered that the Respondent shoved him. When asked if he did recall falling, Volcin stated "I don't remember falling. Maybe I did, maybe I didn't. It happened two years ago." When reminded that he told Civilian Complaint Review Board (CCRB) investigators that he did not fall, Volcin then admitted that he did not fall to the ground.

Volcin further explained that "after he shoved me, I turned around. Then he hit me with his night stick on my back, upper shoulder." When Volcin was asked to explain that if he turned around to face the Respondent, how did he get hit with his nightstick the way he described and Volcin replied "I turned with my neck, not my whole body. He had hit me. I saw that he was going to hit me, so I turned around." He stated that the Respondent was holding the baton with one hand and hit him on the back of his right upper shoulder. He added that he was hit for a total of two times with the baton.

When Volcin was further asked if he had walked a little and then stopped and waited again for the officers to come behind him he responded "Yeah, because he was clearing up Church Avenue. I was walking down into East 39 Street. He came towards me again. I didn't say anything for him to come towards me but he came towards me again to hit me again." He said he didn't remember how many feet it was away from Church Avenue but "it was a lot of feet. He added that after the Respondent pushed him he didn't push him that far but Volcin was "walking forward after he hit me. I didn't just stay there. I was walking forward." He further explained "he shoved me once. After that

he hit me with his nightstick.” Volcin stated that between the first and second time that the Respondent hit him, there was a lapse of time of approximately 30 seconds or less. He stated that during this incident two of his brothers and a friend were still in the restaurant and his “little brother” and another friend were with him. It was after he got hit the second time that he became very mad and yelled out the officer’s name. Volcin then acknowledged that he stated during his CCRB interview that his brother and his friend came to restrain him after he was hit with the baton. When asked if they had to physically hold on to him Volcin stated “I was very mad. If somebody attacks you for no apparent reason, you are going to be mad. I was very mad at the time.” When asked where were the “little brother” and friend that were with him at this time he stated that his brother was in school and he had “no idea” where he friend was because he did not have his number.

Volcin stated that the incident happened early Monday morning and that he went to the hospital on Tuesday. He stated that he didn’t go until Tuesday because he “was deciding whether I should go or not, whether I should complain about it or just let it go.” While Volcin stated that he needed medical attention he “figured Labor Day, they were going to be busy so I went Tuesday instead.” He acknowledged that he did not go to the hospital sooner because he believed he would have had to wait to be seen. He rated the pain in his shoulder an 8 out of 10 and stated that the pain prevented him from raising his arm. Volcin acknowledged that when he went to the hospital they examined him, but they did not take any X-Rays and they prescribed Motrin for the pain.

Volcin stated that when he was interviewed by CCRB investigators, he told them the officer’s name was Reed and he had black hair. They showed him a picture of the

Respondent, and he identified him as the officer who struck him. Volcin, while admitting that he described the Respondent as having black hair explained that "I told him he had black hair. It was dark, it was late at night. I am going to say he had dark hair, but as soon as I saw the picture, it rung a bell, you know." He stated while he got a good look at the name on his badge, when CCRB investigator asked for a description he told them that the officer had black hair.

Volcin further testified that the picture they showed of the Respondent was not contained in a group; rather it was a single photograph. Volcin stated that "after I saw the picture, I was like, I was like oh, he doesn't have black hair, but I remembered it was him." He further stated "I am not good with facial descriptions but I remember that it was him that attacked me. I am not good at describing someone, but I have a good memory of the visual." He further stated "I said black because it was late at night and it probably looked black to me. After she showed me the picture, I saw it was him." When asked if he could describe the other 10 to 15 officers that were with the Respondent Volcin stated "He was the only officer approaching me, so I figured it was a lot easier to describe him."

The Respondent's Case

The Respondent called Police Officer Deevan Dyal as a witness and the Respondent testified in his own behalf.

Police Officer Deevan Dyal

Officer Dyal is a three year member of the Department, currently assigned to the 67 Precinct. He has been assigned to that command for approximately two years. Dyal testified that on September 5, 2005, he was assigned to the West Indian Day Parade detail which is also known as "Jovette."

Dyal stated that he was given pre-tour parade instructions to listen to the radio and keep his eyes open and stay alert. Dyal stated that the parade was concentrated within the Precinct's confines of Church Avenue and Nostrand Avenue, up to East 50 Street. He said that the streets were not closed off and that people were hanging out. He also stated "during that time there was just about thousands of people out that night, a lot of people drinking, a lot of shooting, a lot of stabbings, a lot of fighting."

Dyal stated that at one point he went to Church Avenue and East 50 Street, and approximately two blocks away from that location a female in the crowd was stabbed. He also stated that not long after the stabbing there was a male shot a block away from there. It was at that point that the officers were instructed "to go down and shut down Church Avenue." He stated that the instructions came over the radio from his supervisors.

Dyal stated that once he received his instructions to shut down Church Avenue he responded to Church Avenue and Nostrand Avenue at approximately midnight. He stated that "during that time, we were instructed that we were going to have crowd patrol, we had riot gear on, helmet, baton and we were told to have a formation where we were going to move—going to clear Church Avenue, there couldn't be any pedestrians on that block anymore." He stated at that time there were approximately between 50 to 60 police

officers, and approximately 6 to 7 mounted officers on horses. Dyal also stated that at one point "it looked like it was raining bottles. It was coming from every direction, front of us, left, [and] right. We were trying not to get hit from bottles." Dyal also stated that the helmet they were wearing were riot helmets that had plastic visors to protect their faces.

Dyal stated that he was trained in the Police Academy in how to clear streets. He was instructed to use a wedge formation which is "basically in a V formation, then we are told by a supervisor either step forward or stay your ground, which is basically don't move and so on." Dyal stated that he carried a baton which was to "prevent anybody -- pedestrians from approaching and having them step back." He stated that he was also trained in the use of a baton in that you hold it with two hands and then physically in a horizontal position, chest high, and the baton is held in this manner while walking forward with the baton in front of him.

Dyal testified that he did not strike anyone with his baton, nor did he see the Respondent strike anyone with the baton. He added he knew that he and the Respondent were on opposite sides of the street, but with bottles raining from the roofs and shots being fired on every other block he really could not say where the Respondent was. On cross examination, when asked by the Court to explain what he meant by the other side of the street Dyal stated "it's on a block from one side of the street to the other. It's approximately about maybe 250 to 300 feet of a regular block."

On re-direct examination however, Dyal acknowledged that he did not know the number of feet where he was from the Respondent, but he was able to acknowledge that he was on one side of Church Avenue and the Respondent was across the street on the

other sidewalk, and the sidewalks were separated by two parking lanes and two driving lanes.

On re-cross examination, Dyal acknowledged that he really did not know how far away the Respondent was from him that night.

The Respondent

The Respondent is a three-year member of the Department currently assigned to the 67 Precinct. He stated that he's been at that command for two years. The Respondent stated that on September 5, 2005 he was assigned to the Jovette festival. The Respondent testified that he had previously worked that festival in 2004 and described them both as "completely crazy." During the festival he recalled "bottles being thrown at police officers, shots being fired at police officers and other civilians."

The Respondent stated that prior to going to the festival he was instructed at roll call by Sergeant Logan to "beware of bottles being thrown at us from rooftops, from the ground also, be cautious, a lot of guns out there, a lot of knives out there. Use discretion when dealing with minor things such as drinking in public, urinating in public. You don't want to cause too much of an alarm. One little thing can escalate into a total riot in this neighborhood."

The Respondent stated that the festivities were concentrated on Church Avenue and during the tour he heard over the radio that males and females were being shot, people were stabbed, and that people were throwing bottles off the rooftops at the police

officers.² He stated that while people were mostly drinking and being loud, there was also a lot “of marijuana smell in the air.” The Respondent also stated that people were standing in front of stores and restaurants that were closed for business and people were also walking throughout the area during the course of his tour.

The Respondent stated that at approximately 4 a.m., he and his fellow officers were given an order, by Inspector Boyce, to set up a line or a wedge to clear pedestrians and vehicular traffic eastbound on Church Avenue. Respondent stated that when the order was given approximately 50 to 75 police officers began to move eastbound to clear the area of Church and Nostrand Avenues. He stated that as they were moving eastbound, they were joined by “more and more police officers who had foot posts along Church Avenue.” He stated that there were approximately 300 to 400 police officers who were involved in the effort to clear Church Avenue. He also stated that there were approximately 6 to 10 mounted officers who were also engaged in an effort to clear that area.

The Respondent stated that the officers formed a line across the street and as they walked down the street to clear the area they were “shoulder to shoulder, maybe a little bit of a gap but for the most part shoulder to shoulder.” When the Respondent was asked if he had his riot helmet on that day, he stated “at first there were a large quantity of bottles thrown at us. That’s when I put my riot gear on. After we had about a six block comfort area, I noticed a lot of police officers taking it off. I was feeling a little hot, so I took mine off at that time. I took it off and placed it in one of the vans.”

² The Court accepted into evidence a Sprint report, under Respondent’s Exhibit A (RX A), which reflected the 911 calls made between 1 a.m. and 5:45 a.m. The Sprint Report serves only to illustrate the types of calls made for police assistance during that time period.

The Respondent testified that he did not have any interaction with Volcin during the festival, and had not seen him prior to his appearance in court. He stated when he was called down to CCRB to give his statements, he was shown pictures of Volcin but he did not have any contact with him "whatsoever." The Respondent with regard to striking Volcin with the baton stated "I never struck anyone with the baton." He added that "I did push some people off. I had my baton out in two areas, right at the very beginning, at Church and Nostrand where the amount of people, the amount of civilians celebrating outnumbered the police officers. And then at another area down on Church and Utica, once again where the amount of civilians celebrating outnumbered the Police officers."

The Respondent then described the manner in which he used his baton as "about chest high, horizontal, one hand at both sides of the baton and we just walked, keeping it out and if you had to, you gave a little bit more of a jerky motion to get people to move if they weren't compliant with the orders to move." He stated that most people on Church Avenue were very compliant and his direction to the people was "to clear the area, go down the block, we don't care where you go, where you are from, go down the block and clear Church Avenue." The Respondent acknowledged that as he was clearing Church Avenue the people were filtering down through the side streets. The Respondent stated that if it was a large crowd going down a side street a few officers would follow those people a quarter of the way or half way down the block to ensure that they were definitely dispersing to prevent them from coming back to Church Avenue once the police officers had passed.

The Respondent stated that his training in the Academy, for controlling these types of festivities, was "pretty much don't do anything by yourself, always have other

officers with you, don't use any necessary (sic) force. There is always cameras out there. Be very conscious of that. That's pretty much it."

When asked if it was proper to actually swing the baton like a baseball bat when clearing the street, the Respondent replied stated that it was not and that he did not use his baton in any other manner than what he previously described. He also stated that at no point was he ever separated from his group of fellow officers. He further stated that he did not mace anyone that day and that if people gave him excuses why they could not leave the area the protocol he followed was "if someone said my car is parked right here, say on Church Avenue, we would tell them do us a favor walk up three blocks, come back down another block, we would be 10 blocks down, if an officer tells you, tell them that we told you to get off the area 10, 15 minutes, clear the block. Most people did leave."

The Respondent stated that his hair is blond and it was the same color on September 5, 2005.³ He also stated that he continues to have the same hair style that he had on that day.

On cross-examination the Respondent acknowledged that he did not remember each person that he interacted with on that day. When asked if it was possible that he could have struck Volcin with his baton he responded "I only remember using it at two locations. The other times it was in its ring." He added that "no, it's not possible, because I did not strike anyone with my baton." He reiterated that he remembered using his baton at two locations, Church Avenue and Nostrand and Church Avenue and Utica.

On re-direct examination, the Respondent indicated that on the two locations that he previously mentioned using the baton, he did not swing the baton at anybody.

³ It should be noted that the Court observed the Respondent's in the courtroom and it was blond.

FINDINGS AND ANALYSIS

The Respondent is charged with using excessive force against Volcin by striking him on his shoulder with his nightstick without legal justification.

The Respondent, on September 5, 2005, along with several hundred other officers, was assigned the detail regarding the festivities that took place prior to the West Indian Day parade. According to the testimony given by Volcin, Dyal and the Respondent, along with the celebration at the pre-parade festivities, there were disruptive activities where shots were fired, people were stabbed and bottles were hurled from the roof tops at police officers. The Sprint report in evidence mirrors the violence that took place with descriptions of events that include, "shots fired outside, urgent assist MOS [police officer], ambulance case, serious outside, assault in progress, commercial holdup, larceny in progress and other serious." (RX A)

At one point, the Respondent and his fellow officers received orders to clear Church Avenue of pedestrians. The police procedure used for this task was for the officers to walk in a shoulder to shoulder formation along the street with their batons held in a horizontal position, chest high in front of their bodies. As the officers proceeded along the avenue they urged people through their forward march to either move down the avenue or off the avenue to the side streets. Most people complied. Those that refused and attempted to hold their ground were physically nudged along by the officers with their batons extended in front of their bodies.

Volcin was standing with his friend and younger brother, by his friend's car, at the corner of Church Avenue and East 39 Street at the time when approximately 15 police officers, including the Respondent, approached him while under orders to clear

Church Avenue. The officers' presence did not surprise Volcin because he saw them "coming from far away clearing out Church saying the celebration is over. . .so they were clearing out the streets" Volcin even heard the officers "telling everybody to turn down the block" to clear the location and "it didn't matter if they lived on the next block." Volcin clearly understood that the police were intent on getting all the people off of Church Avenue and out of the area. Yet, when the Respondent and his fellow officers approached him he refused to move as directed. His determination not to move is made clear where he testified that when the officer told him to "go down East 39 Street" he adamantly told the officer that he was waiting by his "friend's car, they (two other brothers) were coming right now."

Volcin's excuse for not moving was that he did not have to because the officers were walking down Church Avenue and clearing only Church Avenue because "they didn't want anybody near Church Avenue." In stating that he was not on Church Avenue, Volcin first claimed that he was on the corner of Church Avenue and East 39 Street; then he claimed he "was mostly on East 39 because the car was parked on the end of the block" and ultimately stated that he "was not on Church Avenue. [He] was on East 39 Street near Church Avenue..." What is clear to the Court, however, is that Volcin was in the "area" the police were ordered to clear, where he was "just hanging out too."

When Volcin refused to move he claimed that an officer grabbed him by his shirt, shoved him and then struck him on his back and upper shoulder. The officer had to have struck him from behind because Volcin testified that after being struck he "turned around to try to get his [the officer's] badge number." He then claimed that the officer struck him again. Volcin "couldn't see his badge number because it was dark, [but] saw his

name after that, after he hit me a second time..." Volcin then became so angry that he yelled out the name "Reed," the name he saw on the Respondent's name plate.

This Court has no doubt that 15 officers, walking in their shoulder to shoulder formation approached Volcin, who had to be on or very close to Church Avenue. Had he been far enough away from Church Avenue, it seems unlikely that 15 officers would have marched down East 39 Street to tell him to leave the area. It seems likely, however, that when he refused to move, the officers, through their march, made contact with him in their effort to clear him, and other people near him, from the area as ordered. Volcin's account of being beaten by the Respondent, however, lacks credibility because his inconsistent testimony at trial does not support the allegations that the Respondent used excessive force against him.

Volcin was admittedly "very mad at the time" and his brother and friend had to intervene to restrain him. He claimed that he became "very mad" after he was hit the second time. But since he felt that he had a right to remain at the location because he "was waiting for my brothers and that was my ride home. I was by their car. I wasn't by anybody else's car," this Court is convinced that his anger came from the officers' insistence and possible physical urging, that he move from the location and away from his "ride home."

Volcin's story was inconsistent in that he first testified that he was shoved, hit on his back and then turned around to face the officers, whereas on cross examination, he stated that "after he shoved me, I turned around. Then he hit me with his night stick on my back, upper shoulder." When asked how he got hit in his back if he turned around

and faced the officer he qualified his answer by saying that "I turned with my neck, not my whole body. He had hit me. I saw that he was going to hit me, so I turned around."

This Court also finds Volcin's testimony questionable where he stated that while "Reed" was hitting him with the baton, the remaining 14 officers did not have any contact with him; rather, "they were all watching" it happen. The Court finds it hard to believe that while Volcin is being struck by the Respondent and being restrained by his brother and friend, that 14 officers simply stopped clearing the area simply to watch Volcin. It should be noted that Volcin's brother and friend never came forward to testify in this case.

Volcin's medical records, (DX 2) which were admitted solely as evidence that force was used, further tend to discount his credibility. Volcin claimed that he was struck twice on the back and shoulder on Monday morning, at approximately 4:45 a. m. Yet, he did not seek medical treatment until Tuesday afternoon at 3:13 p.m., over 34 hours later. His reason for not seeking treatment sooner was because he "figured Labor Day they were going to be busy so I went Tuesday instead" even though he claimed that the pain prevented him from raising his arm. He further claimed, according to those records, that his pain was "severe" pain which he rated 8 out of 10. Hospital personnel, according to Volcin, did not take X-Rays of his shoulder and they indicated in his records that he had a "small bruise" and "tenderness" in the right shoulder area and was prescribed Motrin for pain. If the injury was as severe as he would have this Court believe, then his focus would have had to be on the pain and not on how busy the hospital might have been and he would have sought medical attention much sooner than he did.

Finally, the most troubling aspect of the allegations in this case is the way by which the Respondent was identified as the officer who used excessive force against Volcin.

While the Respondent testified that he does not remember Volcin and denied striking anyone with his baton during his assigned detail, this Court finds no reason to doubt that Volcin had an encounter with police officers who directed him to leave the area they were ordered to clear. But even if an officer hit him, as Volcin claims, what is the reliable evidence that the Respondent is the one who did it?

Volcin stated that while in the midst of approximately 15 officers he was grabbed, pushed, struck with a baton and saw the name "Reed" on one of the officers' nameplates, but Volcin's physical description of "Reed" to investigators was an officer with "black hair." This description gives the Court the strong impression that while Volcin was being moved from the area by the officers and having his anger restrained by his brother and friend, he was looking at the physical characteristics of one officer and the name tag of another. That is the only plausible explanation the Court can arrive at where Volcin can state that "Reed," who clearly has blond hair, was the officer who struck him when he originally asserted that the officer who struck him had black hair. In this Court's opinion, the fact that it was nighttime would not have cause such a big difference in the color that he observed. Light Brown or sandy colored hair could be mistaken for blond hair and dark brown or brown hair could be mistaken for black hair, but black hair mistaken for blond hair can only mean that one person was mistaken for another, especially if they are wearing the same uniform.

Equally troubling for the Court is the identification procedure conducted by the investigator in this case. When Volcin was interviewed he told the investigator about being struck and seeing the name of Reed on the officer's nameplate and identified the officer who struck him as having black hair. The investigator, instead of preparing a photo array, simply showed him a single photograph of the Respondent. When Volcin viewed the photograph, he, according to his statements, did not think in terms of "that's him, that's the officer who struck me," or "that's the officer with the name tag 'Reed,'" or some similar words of immediate recognition that would leave no doubt that the Respondent was the officer who used excessive force against him. Rather, Volcin looked at the photograph of the Respondent and his reaction was "I was like, I was like oh, he doesn't have black hair, but I remembered it was him." He then apparently tried to explain away his description of "black hair" by stating "I am not good with facial descriptions, but I remember that it was him that attacked me. I am not good at describing someone, but I have a good memory of the visual...I said black because it was late at night and it probably looked black to me. After he showed me the picture, I saw it was him." Volcin, through his statements, gives the strong impression that he is explaining away his misidentification.

The serious issue raised by showing a single photograph of the Respondent to Volcin is that it created the strong likelihood that the identification procedure was highly suggestive and failed to offer an evaluation of Volcin's ability to identify the officer he claimed was his assailant. In People v. Yara, 2002 N.Y. Misc. LEXIS 1483, (Crim. Ct. Kings County 2002 [Reichbach, J.]) citing People v. Powell, 105 A.D.2d 712, 412 N.Y.S.2d 157 (2nd Dept., 1984), the Court stated that "the showing of a single photograph

of a suspect to a witness is considered highly suggestive and will usually mandate suppression.” The Court noted that an exception to this principle is the “confirmatory identification exception” which is premised on the familiarity between the witness and the suspect and where such familiarity leaves “little or no risk that police suggestion can lead to misidentification.”

To remove the likelihood of suggestiveness in a one photo identification procedure, the Court in Yara pointed out that the following factors, as directed by the Court of Appeals in People v. Rodriguez, 79 N.Y.2d 445, 583 N.Y.S.2d 814 (1992), should be considered: Familiarity as determined by the number of times the witness saw the defendant prior to the crime; duration and nature of the prior encounters; the settings of the encounters; the period of time over which the prior encounters took place; the time between the crime and the previous viewing between the protagonists and any prior conversations and “whether or not the witness indicated that she recognized and described the person prior to being shown any photograph.”

This Court is mindful that the Yara principles apply to a criminal case. Those principles, however, act as a strong guide for this Court in evaluating the fairness and accuracy of the identification of the Respondent in this case. As such, this Court finds no evidence that showed that Volcin had a relationship or contact of any kind with the Respondent prior to September 5, 2005. Without any prior relationship between Volcin and the Respondent, this Court cannot find that there was enough familiarity between them to consider the identification “confirmatory.”

Consequently, the remaining factor for this Court to consider is whether Volcin indicated that he “recognized and described” the Respondent “prior to being shown any

photograph.” Prior to being shown the single photograph of the Respondent, the only description that Volcin had of the Respondent was the name “Reed” from his nameplate and that he had black hair. While Volcin apparently read the nameplate on the officer’s chest while he was in the midst of 14 of his fellow officers, he had no idea what the Respondent looked like and was clearly made aware of his physical appearance after he was shown the Respondent’s photograph.

The procedure used to identify the Respondent raises more questions about the reliability and validity of the identification than it resolves.

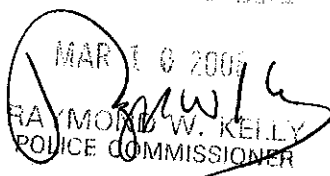
Based on all of the above this Court finds that the Department has not met it’s burden of proof.

Accordingly, I find the Respondent Not Guilty as charged.

Respectfully submitted,


John Grappone
Assistant Deputy Commissioner - Trials

APPROVED


MAR 10 2006
RAYMOND W. KELLY
POLICE COMMISSIONER